NO. 89-460

Supreme Court, U.S.
FILED
SEP 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1989

MARATHON OIL COMPANY, ET AL

Petitioners

VERSUS

McMORAN OFFSHORE EXPLORATION CO., et al

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES G. BURKE, JR.
20th Floor, Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: 504-569-2900
and
BURKE & MAYER, Of Counsel

MAT M. GRAY, III
1207 Whitney Building
New Orleans, Louisiana 70130
Telephone: 504-581-6373
and
FARIS, ELLIS, CUTRONE & GILMORE,
Of Counsel

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

49 pp

QUESTIONS PRESENTED

1. "... whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic."[1]

2. Whether recovery for wrongful damages requires formal ownership in the damaged component of the property or whether some other proprietary interest in the damaged property creates the requisite interest to justify recovery of economic loss.

---

1 East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858 at 871, 106 S.Ct. 2295 at 2302, 90 L.Ed 2d 865 (1986).

LIST OF ALL PARTIES

PURSUANT TO RULE 21.1(B)

The undersigned counsel of record for Marathon Oil Company, Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

1. Marathon Oil Company;
2. Amerada Hess Corporation;
3. OKC Limited Partnership;
4. The Louisiana Land and Exploration Company;
5. Aminoil U.S.A., Inc. (now Phillips Petroleum Company);
6. ODECO, Inc.;
7. Faustug Marine Corporation;
8. Tractug Associates;
9. Continental Insurance Company;
10. McMoRan Offshore Exploration Company;

11. John E. Chance and Associates, Inc.;

12. Arthur Levy Company;

13. Enterprises, Inc.;

14. Fidelity and Casualty Company of New York;

15. National Surety Corporation;

16. Insurance Company of North America;

17. Sidell Insurance Company;

18. Underwriters at Lloyd's in London; and

19. United States Fire Insurance Company.

TABLE OF CONTENTS

	PAGE
Questions Presented.....	i
List of All Parties.....	ii
Table of Contents.....	iv
Table of Authorities.....	v
Reference to Opinions.....	1
Jurisdictional Statement.....	2
Statement of Original Jurisdiction.	2
Statutes Involved.....	3
Statement of the Case.....	3
A. Course of Proceedings and Disposition in the Trial and Appellate Court.....	3
B. Statement of Facts.....	8
Argument.....	15
Conclusion.....	32
Certificate of Service.....	36

TABLE OF AUTHORITIES

	PAGE
Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S.Ct. 467 (1935).....	20
Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985)....	16
Burgess v. M/V TAMANO, 370 F.Supp. 247 (1973), aff'd 559 F.2d 1200 (1st Cir. 1977).....	20
Caltex Oil (Australia) PTY, Ltd. v. The Dredge Willemstad, 136 C.L.R. 529 (1976).....	26
Canadian Transport Co., et al v. Hercules Carriers Inc., 720 F.2d 1201 (11th Cir. 1983), 728 F.2d 1359 (11th Cir. 1984), cert denied 469 U.S. 835, 105 S.Ct. 128, 83 L.Ed. 2d 69 (1984).....	17
Domar Ocean Transportation, Ltd. v. M/V Andrew Martin, 754 F.2d 616 (5th Cir. 1985)...	20

PAGE

East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986)..... 15,32

Getty Refining and Marketing Co. v. MT FADI B, 766 F.2d 829 (3rd Cir. 1985)... 17

Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd., (1964) A.C. 465, (1963) 2 W.L.R. 101 (H.L.)..... 24

In re Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980), cert denied 450 U.S. 291, 101 S.Ct. 1370, 67 L.Ed.2d 349 (1981)..... 19

In re Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968)... 18

Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982)... 17

Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984).. 20

PPG Industries, Inc. v. B. Dredging, Inc., 447 So.2d 1058 (La. 1984)..... 22,23

Robins Dry Dock and Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).....16,19,26

PAGE

SCM (United Kingdom) Ltd. v. W.J. Whittall and Son, Ltd., 1 Q.B. 337 (1971)..... 24

State ex rel. Guste v. M/V TESTBANK 752 F.2d 1019 (5th Cir. 1985), cert denied 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986)..... 17,22

Ultramares Corp. v. Touchet, 255 N.Y. 170, 179 (1931)..... 25

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974)... 19

Venore Transportation Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978)... 18

MISCELLANEOUS TEXTS AND REFERENCES

PAGE

Carbone v. Ursich,
209 F.2d 178, 181-82
(9th Cir. 1953)..... 35

Carpenter, Interference with
Contract Relations,
41 Harv. L. Rev. 728 (1928).... 34

Comment, Foreseeability of
Third-Party Economic Injuries-A
Problem in Analysis,
20 U. Chi. L. Rev. 283 (1953).. 34

Comment, Negligent Interference
With Contract: Knowledge as a
Standard for Recovery,
63 Va. L. Rev. 813 (1977)..... 35

Comment, Negligent Interference
With Economic Expectancy: The
Case for Recovery,
16 Stan. L. Rev. 664 (1964).... 34

Comment, Union Oil Co. v. Oppen:
Recovery of a Purely Economic
Loss in Negligence,
60 Iowa L. Rev. 315 (1974)..... 34

Harper, Interference with
Contractual Relations,
47 Nw. U.L. Rev. 873 (1953) ... 34

PAGE

Henderson, Expanding The Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976)..... 34

James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L.Rev. 43 (1972)..... 34

Note, Interference with Business or Occupation-Commercial Fisherman Can Recover Profits Lost As a Result of Negligently Caused Oil Spill, Union Oil Co. v. Oppen, 88 Harv. L.Rev. 444 (1974)..... 34

Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U.Chi.L.Rev. 61 (1982)..... 35

Prosser, Private Action for Public Nuisance, 52 Va.L.Rev. 997 (1966)..... 35

Posner, Some Uses and Abuses of Economics in Law, 46 U.Chi.L.Rev. 281, 305 (1979)..... 35

Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281 (1982) .. 34

PAGE

Scowcroft, Economic Loss in Admiralty: A Reexamination of Foundations, 16 J. Mar L. Comm. 267 (1985).. 34

See generally, F. Harper and F. James, 1 Law of Torts §6.10, at 501 (1956)..... 34

The Murky Waters of Robins Dry Dock, 60 Tulane Law Review 995 (1986)..... 35

W. Prosser and W. Keeton, Law of Torts §129, at 978 (5th ed. 1984)..... 34

REFERENCE TO OPINIONS

The Reasons of the United States District Court for the Eastern District of Louisiana, June 30, 1987. (unpublished)

The Findings and Conclusions of the United States District Court for the Eastern District of Louisiana, September 16, 1987. (unpublished)

The United States Court of Appeals Opinion of January 3, 1989, is published in 877 F.2d 1214 (5th Cir. 1989).

Denial of Petition For Rehearing and Suggestion For Rehearing En Banc Filed by Marathon Oil Company April 24, 1989, is published in 877 F.2d 1214 (5th Cir. 1989).

Denial of Petition For Rehearing and Suggestion For Rehearing En Banc filed by

Faustug/Continental Insurance Company, May 26, 1989, is published in 877 F.2d 1214 (5th Cir. 1989).

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit of January 3, 1989, as amended by its Opinions dated April 24, 1987, and May 26, 1989.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 17, et seq. of the Rules of the United States Supreme Court.

STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the Admiralty and General

Maritime Laws of the United States and Title 28 U.S.C. 1333.

STATUTES INVOLVED

There are no constitutional provisions, statutes or regulations directly involved in the consideration of this Petition.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION

Proceeding in admiralty under Rule 9(h), Marathon Oil Company, Amerada Hess Corporation, The Louisiana Land and Exploration Company, Aminoil U.S.A., Inc. (now Phillips Petroleum Company) and OKC Limited Partnership (collectively "Marathon") filed a Complaint as the owner of certain mineral leases and production facilities in the U.S. Gulf of Mexico for economic losses resulting from the rupture

of a twenty (20") inch natural gas pipeline. The named defendants were:

a) Ocean Drilling and Exploration Company ("ODECO"), who was the owner and operator of the semi-submersible drilling rig (D/R) OCEAN TRAVELER, whose anchors ruptured the pipeline;

b) McMoRan Offshore Exploration Company ("McMoRan"), who was the assignee of a certain drilling contract with ODECO for the use of D/R OCEAN TRAVELER for the drilling of a well; and

c) Faustug Marine Corporation ("Faustug") who was the operator of the ocean-going tugs ZP CHALONE, ZP CONDON and ZP CAYMUS (collectively the "Tugs").

Marathon Pipeline Company (a subsidiary of Marathon Oil Company), Hess Pipeline

Company (a subsidiary of Amerada Hess Corporation) and The Louisiana Land and Exploration Company (collectively "Marathon Pipeline Company") filed a separate Complaint to recover the costs and expenses in inspecting, surveying and testing their twelve (12") inch oil pipeline which ran parallel and immediately adjacent to the twenty (20") inch gas pipeline. Additionally, Marathon and Marathon Pipeline Company filed claims and answers in limitation proceedings that had been filed on behalf of the Tugs. These proceedings were consolidated with the complaint of Texas Eastern Transmission Company ("TETCO") who, as the owner of the damaged twenty (20") inch line of pipe, sought recovery for its repair costs.

Numerous other parties[2] were brought in by third party complaint on the basis of indemnification, contribution, contract, insurance, etc.

Immediately prior to trial the claim of TETCO was settled for its agreed damages and during the trial the claim of Marathon Pipeline Company was settled for one hundred (100%) percent of its "provable damages" and legal interest thereon. Upon the conclusion of the evidence presented by Marathon, the trial court granted motions of the defendants to dismiss the Complaint and claims of Marathon pursuant to Rule 41(b).

---

2 See "List of All Parties", page ii.

After hearing further evidence, the trial court entered its opinion apportioning liability between the parties, rendering a final judgment on February 1, 1988. From these judgments, Marathon filed appeals with the United States Court of Appeals for the Fifth Circuit, which were consolidated with other appeals filed by those defendants who were aggrieved by the apportionment of liability and/or the granting and/or denial of recovery and contribution.

On January 3, 1989, the United States Court of Appeals for the Fifth Circuit, among other things, affirmed the Opinion of the District Court dismissing the Complaint of Marathon. Petitions for Rehearing and

Suggestions for Rehearing En Banc were denied by the Fifth Circuit.

B. STATEMENT OF THE FACTS

In 1971, Marathon and TETCO entered into an "advance payment agreement" wherein TETCO advanced against future purchases of natural gas $5.5 million to Marathon for the exploration of gas on various mineral leases of Marathon in the U.S. Gulf of Mexico. In the period 1977 through 1983, Marathon drilled various exploratory wells in South Pass 89 and West Delta 85 and 86, making discoveries of significant oil and gas reserves in those fields.

In 1981 and 1982 Marathon and TETCO entered into long term "gas purchase agreements" wherein TETCO agreed to purchase the natural gas production from

these fields on a "take or pay" basis. Pursuant to these and other agreements, Marathon and TETCO agreed to provide certain facilities, whose combined effect allowed for the transportation of the natural gas from the offshore production platform to shore.

To achieve production and transportation of gas and liquid hydrocarbons, Marathon constructed and set platforms in its West Delta and South Pass fields. In that these fields produced significant quantities of both gas and liquid hydrocarbons, it was necessary to construct an oil pipeline to transport the liquid hydrocarbons to Marathon's facilities on shore and a gas pipeline to transport the natural gas hydrocarbons to

interconnect with TETCO's thirty-six (36") inch transmission line at Venice, Louisiana.

Marathon, through its pipeline subsidiary, undertook the total construction of the oil pipeline, sizing it to twelve (12") inches to accommodate the anticipated liquid hydrocarbon production. The gas pipeline was sized to twenty (20") inches to accommodate Marathon's proven and anticipated reserves of natural gas. Other than a meter skid on each platform and the line of pipe from the platform to shore, Marathon furnished and operated all other components of the gas pipeline, including the separators, pumps, coolers, generators, valves, compressors, control stations and mechanisms at the upstream end of the line.

The estimated total cost of these components of the pipeline, including the apportioned cost of the necessary structures, was $50 million or approximately fifty (50%) percent of the total cost of the pipeline. On the downstream end of the trunk line, Marathon furnished and operated flow lines, glycol dehydrators, sections of pipe and various control valves at a cost in excess of $1 million.

The gas pipeline was laid immediately adjacent to the oil pipeline. At the time of the casualty, Marathon was the sole user of the gas pipeline and, under the gas purchase agreement, had the right, which it exercised, to extract liquids and liquefiable hydrocarbons from the gas

stream at the downstream end of the pipeline.

On December 31, 1982, D/R OCEAN TRAVELER, an eight point stabilized semi-submersible drilling unit in tow of the Tugs, attempted to go on location on McMoRan's lease approximately three and one half (3 1/2) miles from the pipelines. Upon arrival at the McMoRan location, D/R OCEAN TRAVELER dropped her two stern anchors but then abated the anchoring procedure until adverse weather conditions subsided.

During the evening of December 31 and the morning of January 1, 1983, D/R OCEAN TRAVELER, with her two anchors still down, drifted and/or was towed westerly by the Tugs. On the dawning of a new day and a

new year, D/R OCEAN TRAVELER knew she was three (3) to four (4) miles west of the McMoRan location. Without any regard that she was in the immediate vicinity, if not over the exact coordinates of the two charted pipelines, D/R OCEAN TRAVELER commenced retrieving her two stern anchors.

Despite her ability to determine her exact location, despite the known location of the two pipelines, and despite the fact that her anchors were known to be fouled, D/R OCEAN TRAVELER continued to exert maximum force on her windlass for ten and one half (10 1/2) hours until one of her 30,000 pound anchors ruptured the twenty (20") inch pipeline. Although the probability of her anchors being fouled on the pipeline was discussed aboard D/R OCEAN

TRAVELER prior to the casualty, the retrieval of her anchors was continued until the gas pipeline was parted.

At the moment of the rupture of the pipeline, Marathon's pilot valves on its platforms detected the loss of pressure in the gas pipeline and communicated the failure to Marathon's master control station which automatically shut-in the wells, the platforms and the pipelines. Full production of gas and oil from these fields could not be resumed until a section of the gas pipeline was replaced.

The damage claimed by Marathon is the monetary value of the natural gas, condensate and crude oil that could not be produced until the repair of the twenty (20") inch pipeline.

ARGUMENT

The issue is that which this Court left unanswered in East River Steamship Corp. v. Transamerica Delaval, Inc.[3] wherein this Court stated:

> **We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic.[4]**

The last authoritative comment by this Court on the recovery of economic damages is Robins Dry Dock and Repair Co. v.

---

3 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986).

4 East River Steamship Corp. v. Transamerica Delaval, Inc. 476 U.S. 858 at 871, 106 S.Ct. 2295, at 2302, 90 L.Ed 2d 865 (1986).

Flint,[5] which was limited in scope and issue. Robins has been construed and applied differently by and within the various Circuits. A strong conflict exists between the Circuits with the First, Third, Fifth and Eleventh Circuits establishing a "bright line" rule that, unless the claimant owns or has a "proprietary interest" in the damaged property, there can be no recovery for economic loss no matter how direct and forseeable.

FIRST CIRCUIT

Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985).

---

[5] 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

THIRD CIRCUIT

Getty Refining and Marketing Co. v. MT FADI B, 766 F.2d 829 (3rd Cir. 1985).

FIFTH CIRCUIT

State ex rel. Guste v. M/V TESTBANK, 728 F.2d 748, on reh 752 F.2d 1019 (5th Cir. 1985), cert denied 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986).

ELEVENTH CIRCUIT

Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982).

Canadian Transport Co., et al v. Hercules Carriers Inc., 720 F.2d 1201 (11th Cir. 1983) 728 F.2d 1359 (11th Cir. 1984) cert denied 469 U.S. 835, 105 S.Ct. 128, 83 L.Ed. 2d 69 (1984).

Other Circuits, faced with this issue, have permitted recovery for economic loss by applying traditional tort concepts of proximate cause, foreseeability, duty and risk. These Courts include the Second, Fourth, Sixth and Ninth Circuits in the following cases:

SECOND CIRCUIT

In re Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968).

... We hesitate to accept the "negligent interference with contract" doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects ...[6]

We therefore prefer to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain.[7]

FOURTH CIRCUIT

Venore Transportation Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978).

Allowing recovery: There is nothing remote about these damages; the only objection is that they were suffered by the time charterer rather than by the owner.[8]

---

6 388 F.2d at 823.

7 388 F.2d at 824.

8 583 F.2d at 711.

SIXTH CIRCUIT

In re Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980) cert. denied 450 U.S. 291, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

We conclude that there is no absolute rule either in Canada or the United States which forbids recovery for economic loss where the claimant has suffered no physical injury.[9]

NINTH CIRCUIT

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

... we refused to apply the teaching of Robins Dry Dock and Repair Company v. Flint, supra, to the situation with which the fishermen were confronted, and observed ...[10]

Within the Circuits adopting the "bright line" rule, there is conflict by

---

9 631 F.2d at 448.

10 501 F.2d at 567.

the carving out of exceptions to the absolute bar.[11] Even this Court has permitted recovery of a contractual loss without the necessity of physical damage to the property.[12]

Thus the First, Third, Fifth and Eleventh Circuits have expanded Robins to

---

11 Burgess v. M/V TAMANO, 370 F.Supp. 247 (1973), aff'd 559 F.2d 1200 (1st Cir. 1977) (loss of catch);

Domar Ocean Transportation, Ltd. v. M/V Andrew Martin 754 F.2d 616 (5th Cir. 1985) (allowed time charterer to collect loss of revenue); and

Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984) (permitted recovery of share of loss of catch).

12 Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S.Ct. 467 (1935).

bar recovery for all economic losses whereas the Second, Fourth, Sixth and Ninth Circuits have ignored or circumvented Robins to permit recovery for economic loss under traditional tort analysis. The reasoning for the extension of Robins or, conversely, the absence thereof has been the subject of numerous commentaries.[13] The consensus is that there is confusion and lack of uniformity between and within the Circuits and with other courts.

In addition to the conflict between the Federal Circuit Courts, the decision of the Fifth Circuit Court of Appeals is in direct conflict with the holding of the Supreme

---

13 Due to the numerous citations the footnote is produced on page 34.

Court of the State of Louisiana in PPG Industries, Inc. v. B. Dredging, Inc.[14] In PPG, which also involved the rupture of a gas pipeline by a vessel, suit was filed under the savings to suitor's clause in state court. PPG sustained an economic loss as a result of the severance of the pipeline but admitted that it had no damage to its property or to property in which it had a proprietary interest. In deciding the claim, the Louisiana Supreme Court did not adopt the "bright line" rule as enunciated in M/V TESTBANK, but adopted a "duty-risk" analysis. Rather than arbitrarily denying a recovery for economic loss where there was no damage to a proprietary interest, the court considered

---

[14] 447 So.2d 1058 (La. 1984).

whether the consequences of the negligent act were foreseeable, proximate, and certain.

The Louisiana Supreme Court's balanced approach does not permit a recovery by a remote or indeterminable class of claimants. There must be an unreasonable risk of harm to the injured person that was known or should have been known by the tortfeasor before a legal duty is imposed. PPG was denied a recovery as its damages were found to be too tenuous and remote.

In the pending claim, suit could not be brought in state court in view of the limitation of liability proceedings. However, the result is that in a maritime claim, perhaps even involving the same accident, under the rule adopted by the

Fifth Circuit Court of Appeals, there would be no recovery unless there is damage to a proprietary interest; whereas, under the rule adopted by the Louisiana Supreme Court, Marathon would have been allowed to proceed provided its claim was not too remote under a traditional tort analysis.

It is interesting that English Courts, upon whom Justice Holmes relied, no longer adopt a preclusionary rule dependent upon physical damage to a proprietary interest. SCM (United Kingdom) Ltd. v. W.J. Whittall and Son, Ltd.[15]; Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.[16] Like Justice

---

15 1 Q.B. 337 (1971).

16 (1964) A.C. 465, (1963) 2 W.L.R. 101 (H.L).

Cardozo in Ultramares Corp. v. Touchet,[17] these courts were concerned that recovery for negligent interference with a contract could create "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[18] The English courts in their approach to limit the class of claimants is similar to that adopted by the Second Circuit and the Louisiana Supreme Court who utilize a "duty-risk" concept amounting to requirements of foreseeability and proximity. The proximity requirement requires knowledge by the tortfeasor of the risk to which his activity exposes the

---

[17] 255 N.Y. 170, 179 (1931).

[18] 255 N.Y. 170, 179 (1931).

particular plaintiff to economic loss. A similar approach has been adopted by the High Court of Australia in Caltex Oil (Australia) PTY. Ltd. v. The Dredge Willemstad.[19]

In this case, the anomalies of the "bright line" test of Robins are clearly demonstrated. Despite Marathon's contribution of an estimated $50 million towards components of the pipeline, the Fifth Circuit held that this did not constitute a sufficient proprietary interest to permit recovery. Had TETCO and Marathon not contributed individual components towards the construction of the pipeline but had jointly participated by

---

[19] 136 C.L.R. 529 (1976).

sharing costs in the design, laying and construction of the entire pipeline, Marathon would have had a sufficient proprietary interest to permit recovery. This demonstrates that form, not substance, controls recovery under the "bright line" rule.

The second anomaly is that had the anchors of D/R OCEAN TRAVELER ruptured Marathon's wholly owned oil pipeline, Marathon would have had recovery for a similar loss of production in that natural gas cannot be produced in commercial quantities from these fields without producing liquid hydrocarbons. Marathon is dependent upon both pipelines being operational in order to achieve commercial production. Both pipelines perform the

same function, the carriage of hydrocarbons, and serve the same platforms. Yet, if the twelve (12") inch pipeline is damaged, Marathon is entitled to recover its economic losses whereas, if the adjacent twenty (20") inch pipeline is damaged, there is no recovery under the "bright line" rule, an illogical result.

The anomaly is further illustrated in that Marathon Pipeline Company was entitled to recover its costs and expenses in inspecting, surveying and testing the twelve (12") inch pipeline which reflected a "scratch" when the 30,000 pound anchors of D/R OCEAN TRAVELER were dragged across the pipeline. This merely illustrates that there exists a logical rule of law that permits recovery of economic damages, i.e.,

when there is a reasonable need for inspection but no physical damage is found.

The fourth anomaly is that had the "take or pay" gas purchase contract between Marathon and TETCO not contained a "force majeure" clause, then TETCO would have been obligated to pay for gas that it could not receive. Under those circumstances, Marathon would have been fully reimbursed and TETCO, as the owner of the section of pipe that was ruptured, would have had a clear right of recovery not only for the repair of physical damages to the pipeline but for its economic losses comprising payments to Marathon for gas it could not take. In this case, the Fifth Circuit expanded the "bright line" rule to release the clearly negligent tortfeasors

from liability due to a contract that they were neither parties nor beneficiaries.

These legal anomalies flowing from an extension of Robins might be expected from Alice's Red Queen but not from a logical and rational legal analysis. Marathon suggests that traditional concepts of duty, risk, causation, foreseeability and damages provide the proper answer. In this case, "duty" is not only imposed by admiralty and maritime law but by regulations for the exploration and exploitation of hydrocarbons on the U.S. Continental Shelf. The "risk" of causing damage to properly charted, permitted and laid pipelines after fouling with one's anchor is known to every mariner. That "causation" between the fouling of a pipeline with one's anchor and

the rupture is proximate and direct is indisputable. "Foreseeability" of interrupting production by severing a pipeline servicing an offshore facility, whether gas and/or oil, is known to every operator and service contractor in the U.S. Gulf. In fact, representatives of defendants were aboard Marathon's South Pass platform to triangulate the precise location of the rig. "Damages" to Marathon are real, actual and substantial. Besides the loss of liquids and liquefiable hydrocarbons in the pipeline at the time of the rupture, the proven oil and gas reserves of Marathon, due to drainage and exploitation by others, may never be recovered.

CONCLUSION

When a rule of law, once extended, leads to inequitable results and creates principles of recovery that are at odds with the great weight of tort jurisprudence, then that rule of law merits scrutiny.

The issue raised in East River can only be answered by this Court. Without a response, parties will continue to petition the Court for a definitive answer. For the sake of uniformity among the circuits, to avoid forum shopping by parties, and to achieve judicial economy, it is respectfully suggested that a Writ of Certiorari be granted.

Respectfully submitted,

JAMES G. BURKE, JR. (Bar No. 3676)
1100 Poydras Street
20th Floor, Energy Centre
New Orleans, Louisiana 70163
Telephone: (504) 569-2900

Attorneys for Marathon Oil Company, Amerada Hess Corporation, OKC Limited Partnership, Aminoil U.S.A., Inc. (now Phillips Petroleum Company), and The Louisiana Land and Exploration Company

MAT M. GRAY, III
1207 Whitney Building
New Orleans, Louisiana 70130

Attorneys for The Louisiana Land and Exploration Company

Footnote No. 13

See generally, F. Harper and F. James, 1 Law of Torts §6.10, at 501 (1956); W. Prosser and W. Keeton, Law of Torts §129, at 978 (5th ed. 1984); Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728 (1928); Harper, Interference with Contractual Relations, 47 Nw. U.L. Rev. 873 (1953); Henderson, Expanding The Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976); James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L.Rev. 43 (1972); Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281 (1982); Scowcroft, Economic Loss in Admiralty: A Reexamination of Foundations, 16 J. Mar L. Comm. 267 (1985); Note, Interference with Business or Occupation-Commercial Fisherman Can Recover Profits Lost As a Result of Negligently Caused Oil Spill,-Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), 88 Harv. L.Rev. 444 (1974); Comment, Union Oil Co. v. Oppen: Recovery of a Purely Economic Loss in Negligence, 60 Iowa L. Rev. 315 (1974); Comment, Negligent Interference With Economic Expectancy: The Case for Recovery, 16 Stan. L. Rev. 664 (1964); Comment, Foreseeability of Third-Party Economic Injuries-A Problem in Analysis, 20 U. Chi. L. Rev. 283 (1953); Comment, Negligent Interference With Contract:

Knowledge as a Standard for Recovery, 63 Va. L. Rev. 813 (1977); The Murky Waters of Robins Dry Dock, 60 Tulane Law Review 995 (1986); Carbone v. Ursich, 209 F.2d 178, 181-82 (9th Cir. 1953); Posner, Some Uses and Abuses of Economics in Law, 46 U.Chi.L.Rev. 281, 305 (1979); Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U.Chi.L.Rev. 61 (1982); Posser, Private Action for Public Nuisance, 52 Va.L.Rev. 997 (1966).

CERTIFICATE

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the petitioners herein and that three copies of the above Petition for Writ of Certiorari to the United States Supreme Court were served upon the following named counsel for all parties, first class postage prepaid, this 5TH day of September, 1989:

Mr. Maurice C. Hebert, Jr.
Hebert, Mouledoux & Bland
1650 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Mr. Robert M. Contois, Jr.
Jones, Walker, Waechter, Poitevent,
Carrere & Denegre
50th Floor - Texaco Center
400 Poydras Street
New Orleans, Louisiana 70130

Mr. Charles E. Lugenbuhl
Lugenbuhl, Burke, Wheaton, Peck & Rankin
Suite 1751 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130

Mr. Andrew T. Martinez
Terriberry, Carroll & Yancey
3100 Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70112

Mr. Machale A. Miller
O'Neil, Eichin, Miller & Breckinridge
2600 One Poydras Plaza
New Orleans, Louisiana 70112

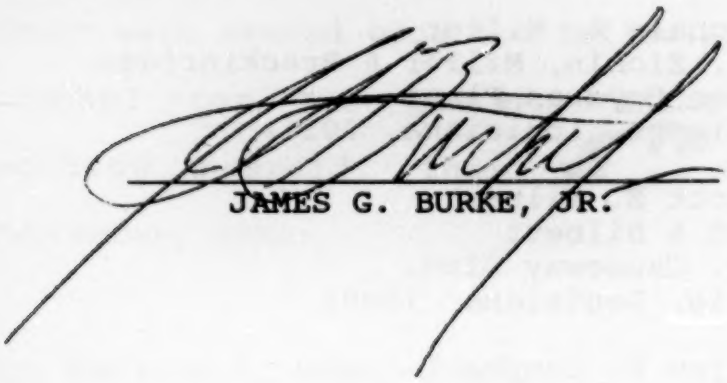
Mr. Scott E. Silbert
Lombard & Silbert
3636 N. Causeway Blvd.
Metairie, Louisiana 70002

Mr. Allen F. Campbell
Deutsch, Kerrigan & Stiles
755 Magazine Street
New Orleans, Louisiana 70130

Mr. Gerard T. Gelpi
Gelpi, Sullivan, Carroll & Laborde
430 Notre Dame Street
New Orleans, Louisiana 70130

Mr. Ronald A. Johnson
Johnson & McAlpine
701 S. Peters Street
Suite 300
New Orleans, Louisiana 70130

Mr. James M. Tompkins
Galloway, Johnson, Tompkins & Burr
4040 One Shell Square
New Orleans, Louisiana 70139



JAMES G. BURKE, JR.